No. 2-18-00138-CR

COURT OF APPEALS
SECOND JUDICIAL DISTRICT OF TEXAS
FORT WORTH, TEXAS

CRYSTAL LA VON MASON-HOBBS,
Appellant,
v.
THE STATE OF TEXAS,
Appellee.

On Appeal from the 432nd Judicial District Court of Tarrant County, Texas
Cause No. 1485710D (Judge Ruben Gonzalez, Jr., Presiding)

BRIEF OF *AMICUS CURIAE* THE LEAGUE OF WOMEN VOTERS OF TEXAS IN SUPPORT OF APPELLANT'S REQUEST FOR REHEARING OR REHEARING EN BANC

Robert Reyes Landicho
State Bar No. 24087881
VINSON & ELKINS LLP
1001 Fannin St., Suite 2500
Houston, TX 77002
rlandicho@velaw.com

James Dawson
State Bar No. 24094618
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW
Suite 500 West
Washington, DC 20037
jamesdawson@velaw.com

Thomas S. Leatherbury
State Bar No. 12095275
Paige Wright
State Bar No. 24109833
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3900
Dallas, TX 75201
tleatherbury@velaw.com
pwright@velaw.com

Attorneys for *Amicus Curiae* The League of Women Voters of Texas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The League of Women Voters of Texas is a non-partisan, volunteer organization committed to encouraging informed and active participation in government, working to increase understanding of major public policy issues, and influencing public policy through education and advocacy.

The League of Women Voters of Texas is interested in the questions presented because this case involves important issues affecting participation in the voting process in Texas. The outcome of this case will also affect the state and national discourse on the fundamental right to vote and the use of provisional ballots under the federal Help America Vote Act.

No fee has been paid or will be paid by the League of Women Voters of Texas or by any of the parties for the preparation of this brief. Tex. R. App. P. 11. *Amicus* counsel are providing their services pro bono.

SUMMARY OF THE ARGUMENT

In affirming Ms. Mason's conviction for illegal voting, the Opinion made a critical error by holding that she had "vote[d]" at all. One does not "vote" by marking a provisional ballot that is not counted by elections officials. That conduct

is, at most, an "attempt[] to vote"—and thus Ms. Mason's felony conviction for having actually "vote[d]" illegally should be vacated.[1] *See infra* § I.

Moreover, the construction of the Illegal Voting Statute adopted in the Opinion is preempted by the Help America Vote Act ("HAVA"). Instead of approving an Opinion that brings Texas law into conflict with a federal statute, this Court should grant rehearing, apply the canon of constitutional avoidance, and hold either that the marking of a provisional ballot is not a "vote" or that an illegal-voting conviction requires subjective knowledge of ineligibility. *See infra* § II.

The panel compounded its errors by holding that it was "irrelevant" whether Ms. Mason subjectively knew that she was ineligible to vote—a theory so at odds with the statute that even the State did not pursue it on appeal. If left uncorrected, the Opinion will imperil the integrity of future elections by deterring voting among citizens who fear criminal prosecution for honest errors in assessing their eligibility. *See infra* § III.

[1] As explained below, Ms. Mason could not have been convicted of an "attempt to vote illegally" due to a lack of specific intent. *See infra* at 4 & n.3.

ARGUMENT

I. The Opinion Erred By Misreading the Word "Vote" as Used in the Illegal Voting Statute and By Failing to Apply Texas's Rule of Lenity.

The Opinion holds that the word "vote" can be "broadly defined as expressing one's choice, regardless of whether the vote is actually counted." Op. at 27. That construction of the word "vote" is wrong for two reasons.

First, this interpretation of "vote" reads language out of the statute. The statute provides that "[a] person commits an offense if the person . . . votes or ***attempts to vote*** in an election in which the person knows the person is not eligible to vote." Tex. Elec. Code § 64.012 (emphasis added). The fact that the legislature separately criminalized "vot[ing]" illegally (a second degree felony, *id.* § 64.012(b)) and "attempt[ing] to vote" illegally (a state-jail felony, *id.*) means that there must be some conduct that constitutes an "attempt[] to vote" but yet does not constitute illegal voting. The key distinction between the crimes of voting illegally and attempting to vote illegally is whether the ineligible voter succeeds in having the ballot counted. *See Martinez v. State*, 278 S.W.2d 156, 157 (Tex. Crim. App. 1955) (sustaining attempt conviction where defendant took affirmative steps to achieve his ends "but did not accomplish his desires"); *see also Thornton v. State*, 425 S.W.3d 289, 302 n.63 (Tex. Crim. App. 2014) (noting that "success" differentiates a "mere attempt" from commission of the underlying crime). The Opinion's insistence that it is nonetheless irrelevant "whether the vote is actually counted" (Op. at 27) destroys

the statutory distinction between a "vote" (one that is counted) and an "attempt[ed]" vote (one that is not). This interpretation therefore violates the rule against superfluities, which requires that a statute be interpreted to avoid rendering any of its language superfluous or otherwise meaningless. *See Heckert v. State*, 612 S.W.2d 549, 552 (Tex. Crim. App. 1981); Tex. Gov't Code § 311.021(2).

Thus, even if Ms. Mason may have "attempt[ed] to vote" by marking a provisional ballot, she did not actually "vote" because that ballot was not counted. It is for this reason that numerous cases have described marking a provisional ballot as an "attempt" to vote.[2] This is ***not*** to say that Ms. Mason could have been convicted of attempted illegal voting. That, too, would have been improper.[3] Instead, the point is that the existence of a separate crime for attempted illegal voting is valuable context for construing the word "vote." Under the statutory-interpretation canon of *noscitur a sociis*, the meaning of "a term, word, or phrase

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[2] *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 467 (6th Cir. 2008) (describing voters' completion of provisional ballots as "attempts to vote"); *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1076 (D. Kan. 2018) (describing a situation where a citizen "was given a provisional ballot to fill out" after a poll worker could find no record of his registration as one where the citizen "attempted to vote").

[3] Ms. Mason was not charged with attempting to vote illegally. Ms. Mason could not have been convicted of attempt—and her conviction cannot now be reformed downwards to attempt—because all attempts are specific intent crimes. Tex. Penal Code § 15.01(a). Ms. Mason did not have specific intent to vote illegally because she did not subjectively believe that she was ineligible to vote. In addition, any conviction under the statute (including an attempt) would be improper for the reasons set forth in sections II and III, *infra*, which apply equally to an "attempt."

may be understood or recognized from the company it keeps or in which it is found." *Hand v. State*, 227 S.W. 194, 198 (Tex. Crim. App. 1920); *see Sullivan v. City of Fort Worth*, No. 02-10-00223-CV, 2011 WL 1902018, at *7 (Tex. App.—Fort Worth May 19, 2011). At the very least, the existence of a lesser attempt crime makes it plausible that the greater crime of illegal voting requires that the ballot in question must have counted in the election.

Second, the Opinion's reading of the word "vote" is plainly overbroad. According to the Opinion, any action that "express[es] one's choice" or "express[es] one's preference" is a vote. Op. at 26-27. This construction permits the criminalization of a broad swath of conduct that the legislature could not have meant to prohibit. Suppose, for example, that a citizen enters into a polling place, announces "I vote for President Trump," and then leaves without completing a ballot. Or suppose that a citizen leaves the polling place with a completed paper ballot in his or her pocket instead of depositing it with elections officials. According to the Opinion, these citizens have "voted" by "express[ing their] choice," and it is irrelevant that "the choice expressed" is not "counted as part of the poll results." Op. at 27.

Texas's statutory rule of lenity states that "a statute or rule that creates or defines a criminal offense or penalty shall be construed in favor of the actor if any part of the statute or rule is ambiguous on its face or as applied to the case." Tex.

Gov't Code § 311.035. As explained above, Ms. Mason has established that it is at least plausible that the act of marking a rejected provisional ballot does not constitute "voting" under the Texas Election Code. When, as here, there is doubt as to the proper construction of a criminal statute, the rule of lenity "dictates that such doubt should be resolved in favor of the accused." *Diruzzo v. State*, 581 S.W.3d 788, 802 n.22 (Tex. Crim. App. 2019); *accord* Op. at 11. Thus, the Panel should have applied the rule of lenity and vacated Ms. Mason's conviction on the ground that she did not "vote" in the 2016 presidential election.

II. The Opinion Unnecessarily Places Texas Law Into Conflict with Federal Law and Should Be Revisited to Avoid Creating Constitutional Problems.

A. If the Opinion's interpretation of the Illegal Voting Statute is correct, then the statute is preempted and therefore void.

HAVA provides that an "individual shall be permitted to cast a provisional ballot" if his or her name "does not appear on the official list of eligible voters for the polling place" but yet the "individual declares that [he or she is] a registered voter in the jurisdiction." 52 U.S.C. § 21082(a). The voter's declaration must take the form "of a written affirmation . . . stating that the individual" is both "a registered voter in the jurisdiction in which the individual desires to vote" and is "eligible to vote in that election." *Id.* § 21082(a)(2). The plain import of HAVA is that any "person who ***claims*** eligibility to vote"—regardless of whether that claim is objectively true or false—"is entitled . . . to cast a provisional ballot." *Sandusky Cty.*

Democratic Party v. Blackwell, 387 F.3d 565, 570 (6th Cir. 2004) (per curiam) (emphasis added). The duty of election officials to allow a citizen to mark a provisional ballot upon a claim of eligibility is "mandatory," *id.* at 572-73, and thus courts have not hesitated to find that state laws are preempted by HAVA when, as here, they purport to interfere with the exercise of that right. *See Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1269 (W.D. Wash. 2006); *Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *12 (Colo. Dist. Ct. Oct. 18, 2004).

According to the Opinion, marking a provisional ballot is sufficient to satisfy the "vote" element, and "the State does not have to prove that the defendant subjectively knew" that she was ineligible to vote in order to secure a conviction. Op. at 13. With those principles in mind, consider an individual—like Ms. Mason—who completes a written affirmation and then marks a provisional ballot. Suppose further that the citizen took both actions with a subjective belief that she was eligible to vote but with knowledge of facts that—unbeknownst to her—rendered her ineligible to vote. This voter's actions were expressly permitted by HAVA, which requires that this individual be permitted to mark a provisional ballot upon attesting to her eligibility. But, according to the Opinion, these same actions would constitute a felony in Texas.

That cannot be the law. A state statute is invalid when it purports to criminalize conduct that federal law expressly permits. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981) (state law cannot bar activity "that is permitted by federal law"); *Lord v. Local Union No. 2088, Int'l Bhd. of Elec. Workers, AFL-CIO*, 646 F.2d 1057, 1061 (5th Cir. 1981) (similar); *see also Sabine Consol., Inc. v. State*, 806 S.W.2d 553, 559 (Tex. Crim. App. 1991) (criminal laws preempted when "compliance with state and federal law is an impossibility").[4] If the Opinion's interpretation of the Illegal Voting Statute is correct, then that law is preempted because it criminalizes conduct that HAVA protects—*i.e.*, the marking of a provisional ballot by an individual who has affirmed his or her belief that he or she is eligible to vote, when such belief is subjectively held but is objectively incorrect.

[4] The Illegal Voting Statute as construed in the Opinion is preempted by operation of the Elections Clause. U.S. Const. art. I, § 4, cl. 1. The preemptive force of the Elections Clause is much greater than the preemptive force of the Supremacy Clause; indeed, given that "the power the Elections Clause confers is none other than the power to pre-empt" and that federalism concerns are "weaker" in the Elections Clause context, the U.S. Supreme Court has held that there is no presumption against preemption in Elections Clause cases. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013). *Amicus* refers to cases decided under the Supremacy Clause merely because Elections Clause cases are relatively scarce. For the reasons explained above, the preemption jurisprudence developed in the Supremacy Clause context applies even more forcefully in the Elections Clause context. *See id.*

The Opinion attempts to escape the specter of preemption by claiming that Congress did not "inten[d] in HAVA's mandated provisional-ballot procedure to preempt state laws that allow illegal-voting prosecutions." Op. at 44. But that is mistaken. By choosing to guarantee the availability of a provisional ballot to "people whose eligibility is in doubt," Congress intended that citizens would engage in such provisional balloting, and thus criminalizing such conduct would stand as an obstacle to Congress's objective. H.R. Rep. No. 107-329, pt. 1, at 37-38 (2001); *see Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426–27 (Tex. 2005).

It is no answer to suggest, as does the Opinion, that HAVA does not preempt prosecutions of citizens who mark provisional ballots because it "expressly requires a provisional voter to affirm that the voter is both registered and eligible under state law—thus placing that person at risk of federal and state criminal liability if the information is false." Op. at 44. This portion of the Opinion appears to conclude that HAVA could not preempt the prosecution at issue here because HAVA itself contemplates that a citizen may be subject to criminal liability for providing false information in an affirmation. But the Opinion fails to appreciate that, in either Texas or in the federal system, a criminal conviction for providing false information requires that the declarant must have ***subjectively*** known that the information provided was false. *See* Tex. Penal Code § 37.02(a); 18 U.S.C. § 1621. On the other hand, a conviction for illegal voting in Texas can (according to the Opinion) be

sustained upon proof that the citizen had knowledge of facts that rendered her ineligible to vote, even if she did not subjectively realize she was ineligible. The fact that HAVA leaves open the door to prosecution when an individual signs an affidavit and marks a provisional ballot while subjectively knowing she is ineligible to vote has no bearing on this case, in which scienter is purportedly irrelevant.

B. This Court can avoid federal preemption by adopting either of two alternative, reasonable constructions of the statute.

The United States Supreme Court has instructed that, "if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012); *accord Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998). When applying this canon of "constitutional avoidance," the inquiry is not whether one potential construction of a statute may be marginally more sensible than the other, but is instead whether there is any "reasonable" or "possible" interpretation of the statute that would avoid bringing a statute into conflict with the federal Constitution. *Sebelius*, 567 U.S. at 562; *Ex parte Thompson*, 442 S.W.3d 325, 339-40 (Tex. Crim. App. 2014) (noting that "Texas courts have a duty to employ a reasonable narrowing construction" to avoid constitutional conflicts). It would be reasonable for the Court to conclude that Ms. Mason did not "vote" in the 2016 election or that the Illegal Voting Statute required subjective knowledge of ineligibility. Thus, this Court should adopt one or both of these readings.

III. The Panel's Interpretation of the Texas Election Code Improperly Criminalizes Voting by Anyone Who Incorrectly Believes that He or She Is Eligible to Vote.

A. The panel improperly discredits the requirement that a person must know that he or she is not eligible to vote in order to violate Texas Election Code § 64.012.

The Texas Illegal Voting Statute provides that "[a] person commits an offense if the person . . . votes or attempts to vote in an election in which the person ***knows*** the person is not eligible to vote." Tex. Elec. Code § 64.012 (emphasis added). The Opinion construes this language to mean that "the State does not have to prove that the defendant subjectively knew" that she was ineligible to vote. Op. at 13-14.

The Opinion cannot be squared with *Delay v. State*, in which the Court of Criminal Appeals held that a criminal statute's "knowing" *mens rea* requirement requires the actor to be aware of the criminality of his conduct. 465 S.W.3d 232, 246-47 (Tex. Crim. App. 2014). It therefore comes as no surprise that the State's chief argument at trial and on appeal was that the evidence established that Ms. Mason subjectively knew she was ineligible to vote. *See* State's Brief at 24-27, 42-43 (Mar. 28, 2019). The State's brief did ***not*** argue that a conviction could be obtained even if Ms. Mason did not subjectively know she was ineligible. The Opinion nonetheless absolved the State of any obligation to show that Ms. Mason subjectively knew her conduct was wrongful, thus erring by both misstating the law and by deciding the case on the basis of a *sua sponte* theory that departed markedly

from the arguments presented by the parties. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020) (where appellate panel departed "drastically from the principle of party presentation" in resolving criminal appeal, the Court vacated the decision and remanded for reconsideration of the issues as "shaped by the parties").

In a footnote, the Opinion attempts to explain away *Delay* by noting that:

> The statutes in *Delay* were ambiguous because they placed the "knowingly" descriptor before both the verb describing the actus reas and the following clause describing the actus reas; Section 64.012(a)(1) places the word "knows" after the actus-reas verb and immediately before the word describing the attendant circumstances—"ineligible." Thus, what "knows" was intended to describe in Section 64.012(a)(1) is not ambiguous, as was the word placement in the [*Delay*] statutes.

Op. at 14-15 n.12. The Opinion misreads *Delay*. *Delay* first interpreted Texas Penal Code § 34.02(a)(2), which states that a person commits money laundering if he "knowingly . . . conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity[.]" *Delay*, 465 S.W.3d at 246. The Court determined that the statute was patently ambiguous because it was not immediately clear whether the defendant must be aware that the transaction he is conducting, supervising, or facilitating involves the proceeds of criminal activity. The Court looked to the legislative intent of the statute and determined that "the Legislature must surely have intended that, to commit or conspire to commit money laundering, the actor ***must be aware of the fact that the transaction involves the proceeds of criminal activity***." *Id.* at 246-47 (emphasis added). But most critically, the Court

analyzed Section 253 of the Election Code, which criminalizes certain corporate political contributions (including contributing proceeds garnered from money laundering). *Id.* at 249-50. Section 253.003(a) states that "[a] person may not knowingly make a political contribution in violation of this chapter." Tex. Elec. Code § 253.003(a). The Court held that a conviction under Section 253.003(a), like Texas Penal Code Section 34.02(a), requires more than the awareness of the underlying circumstances that would in fact violate Section 253.003(a)—the individual must "actually realize[] that to make a political contribution under these circumstances would in fact violate Section 253.003(a)." *Delay*, 465 S.W.3d at 251-52. In direct contravention of *Delay*, the Opinion holds that "the State does not have to prove that the defendant subjectively knew" that she was ineligible to vote; instead, "the State need only show beyond a reasonable doubt that the defendant voted while knowing of the condition that made the defendant ineligible." Op. at 13-14; *see id.* at 49.

The *Delay* case is the most recent on-point decision from the Court of Criminal Appeals analyzing the *mens rea* requirements in the Texas Election Code. However, in support of its holding, the Opinion relies on three less-relevant cases concerning illegal voting: *Thompson v. State*, 9 S.W. 486, 486–87 (Tex. Ct. App. 1888); *Jenkins v. State*, 468 S.W.3d 656, 672–73 (Tex. App.—Houston [14th Dist.] 2015), *pet. dism'd, improvidently granted*, 520 S.W.3d 616 (Tex. Crim. App. 2017)

(per curiam); and *Medrano v. State*, 421 S.W.3d 869, 884–85 (Tex. App.—Dallas 2014, pet. ref'd). *See* Op. at 14-17 & n.12. The *Delay* case abrogates any contradicting law from *Thompson*, an 1888 Texas Court of Appeals case. The other two cited cases, *Medrano* and *Jenkins*, are non-controlling authority. And in any event, none of these cases support the Panel's holding.

The Opinion cites *Thompson* for the contention that "the State did not have to prove that [the defendant] knew that voting after being finally convicted of a felony was illegal." Op. at 16 (citing *Thompson*, 9 S.W. at 486–87). But in *Thompson*, the defendant knew that he had been convicted of a felony and proceeded to cast a non-provisional ballot in a local election at a time when the Texas Constitution did not authorize the re-enfranchisement of any person convicted of a felony. *Thompson*, 9 S.W. at 486. Furthermore, the Court in *Thompson* distinguished its opinion from a related case, *Commonwealth v. Bradford*, 50 Mass. 268 (1845), in which a defendant was acquitted for illegal voting after having voted at the wrong precinct based on his mistaken belief that he was domiciled in that precinct:

> We do not regard the opinion in [*Bradford*], cited by counsel for defendant, as being in conflict with the view above expressed. In that case the right of the defendant to vote depended upon a question of fact as well as of law, and ***the court very properly held that it devolved upon the prosecution to prove that he knew he was not a qualified voter.***

Thompson, 9 S.W. at 487 (emphasis added). The *Thompson* opinion endorses the *Bradford* court's holding that the prosecution must prove that the defendant knew he was not a qualified voter, in direct opposition to the Panel's decision here. *See* Op. at 13-14. Furthermore, Ms. Mason's case features questions of fact as well as of law, just as the *Bradford* case does, for at least the following reasons: (1) Ms. Mason's submission of an uncounted provisional ballot cannot plainly be construed as a "vote" under Texas law; and (2) Ms. Mason's act of marking a rejected provisional ballot while on federal supervised release does not meet the essential elements of Texas's Illegal Voting Statute. Thus, Ms. Mason's case is more akin to *Bradford* than *Thompson*.

The Panel's reliance on *Medrano* and *Jenkins* is similarly inappropriate. The facts of *Medrano* are starkly different than the facts in Ms. Mason's case. In *Medrano*, the defendant was a former Dallas County Justice of the Peace who was charged with soliciting a niece to illegally vote in an election in which Medrano was a candidate for office. *Medrano*, 421 S.W.3d at 873-74. The niece testified that she did not know she was ineligible to vote but she did know that (1) she filled out a voter registration card and voted in the election by using an address where she did not reside; (2) she was not a resident of the precinct in which she voted; and (3) she had to lie on her voter registration card in order to vote. *Id.* at 875. On those facts, the Court found that "the State did not need to prove [the niece] subjectively knew

she was not eligible to vote; it needed only to prove she voted in the [the election] when she knew she was not a resident of the precinct for which she was voting." *Id.* at 885. But in *Medrano*, there were no questions of fact or of law that existed with respect to the niece's actions—it was obvious that casting a non-provisional vote in an election as a non-resident was illegal. In the instant case, there are clear questions of fact and of law, making *Medrano* a poor comparator.

The Opinion also cites the *Jenkins* case, in which the defendant and several of his associates conspired to manipulate an election in a precinct in which they did not reside by listing their voter registration address as a hotel address in that precinct. *Jenkins*, 468 S.W.3d at 660-62. The Court in *Jenkins* reversed the conviction and ordered a new trial, finding that Jenkins presented evidence that he reasonably relied on the election law authorities when he voted and that "***the reasonableness of Jenkins's beliefs and conduct was an issue for the jury to decide***." *Id*. at 680 (emphasis added). The *Jenkins* opinion was based on the "mistake of law" defense, wherein "a defendant must present some evidence that (1) he reasonably believed that his conduct did not constitute a crime; and (2) he reasonably relied upon either an official statement of the law or a written interpretation of the law of the type specified in the statute." *Id.* at 673. The Panel here dismissed the mistake of law defense based on a purported lack of evidence, *see* Op. at 18, but failed to acknowledge the reasonableness of Ms. Mason's beliefs and conduct.

B. The Panel's Opinion will depress voter participation because citizens will now fear criminal prosecution for honest errors in assessing their right to vote.

The Opinion's interpretation of the Texas Election Code is squarely at odds with Congress's intent, as expressed in HAVA, that no individual be turned away from the polls if the individual believes he or she is eligible to vote. *See* H.R. Rep. No. 107-329, pt. 1, at 38 (2001). The Opinion creates a system in which a potential voter who harbors any amount of uncertainty regarding her eligibility will choose to stay home on Election Day rather than face the possibility of criminal consequences.

The ability to cast a provisional ballot is a "fail safe" voting procedure that provides an opportunity for the voter to participate when her eligibility is in question. From 2006 to 2016, more than 10 million provisional ballots were issued when there was a question concerning an individual's eligibility to vote, and 7.3 million provisional ballots were counted. *See* U.S. Election Assistance Comm'n, *White Paper: EAVS Deep Dive: Provisional Ballots*, https://www.eac.gov/documents/2018/06/07/eavs-deep-dive-provisional-ballots. Under the Opinion's reasoning, any Texan who cast one of these 2.7 million rejected ballots could have been convicted of a felony—no matter their mental state. In its Opinion, the Panel rightfully acknowledges that "one of HAVA's main purposes was to increase voter registration and participation of eligible voters by reducing unnecessary procedural, administrative, and technical obstacles to voting." Op. at 43. The Panel's

interpretation of the Texas Election Code creates an unnecessary procedural, administrative, and technical obstacle to voting—an outcome that Congress certainly didn't intend.

CONCLUSION AND PRAYER

The League of Women Voters of Texas prays that this Court grant en banc reconsideration, vacate the Opinion, and order a judgment of acquittal.

Dated: June 11, 2020

Respectfully submitted,

/s/ Thomas S. Leatherbury
Thomas S. Leatherbury
State Bar No. 12095275
Paige Wright
State Bar No. 24109833
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3900
Dallas, TX 75201
Tel: (214) 220-7792
Fax: (214) 999-7792
tleatherbury@velaw.com
pwright@velaw.com

Robert Reyes Landicho
State Bar No. 24087881
VINSON & ELKINS LLP
1001 Fannin St., Suite 2500
Houston, TX 77002
Tel: (713) 758-2193
Fax: (713) 615-5182
Rlandicho@velaw.com

James Dawson
State Bar No. 24094618
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW
Suite 500 West
Washington, DC 20037
Tel: (202) 639-6588
Fax: (202) 879-8998
JamesDawson@velaw.com

Counsel for Amicus Curiae
The League of Women Voters of Texas

CERTIFICATE OF SERVICE

I certify that, on June 11, 2020, I filed the attached document with the Clerk of the Court using the Court's ECF system. I hereby certify that a true and correct copy of this Brief *Amicus Curiae* has been served on all counsel of record via e-service:

Sharen Wilson
Criminal District Attorney

Joseph W. Spence
Assistant Criminal District Attorney
Chief, Post-Conviction

Helena F. Faulkner
Matt Smid
John Newbern
Assistant Criminal District Attorneys

401 W. Belknap
Fort Worth, TX 76196
coaappellatealerts@tarrantcountytx.gov

Counsel for Appellee

Alison Grinter
6738 Old Settlers Way
Dallas, TX 75236
alisongrinter@gmail.com

Kim T. Cole
2770 Main Street, Suite 186
Frisco, TX 75033
kcole@kcolelaw.com

Thomas Buser-Clancy
Andre Ivan Segura
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
tbuser-clancy@aclutx.org
asegura@aclutx.org

Rebecca Harrison Stevens
Emma Hilbert
Texas Civil Rights Project
1405 Montopolis Drive
Austin, TX 78741-3438
beth@texascivilrightsproject.org
emma@texascivilrightsproject.org

Sophia Lin Lakin**
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
slakin@aclu.org
**admission *pro hac vice* pending

Hani Mirza
Texas Civil Rights Project
1412 Main Street, Suite 608
Dallas, TX 75202
hani@texascivilrightsproject.org

Counsel for Appellant

/s/ Thomas S. Leatherbury
Thomas S. Leatherbury

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned hereby certifies that this Brief of Amicus Curiae complies with the applicable word count limitation because it contains 4,491 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certification, the undersigned has relied on the word-count function in Microsoft Office 365, which was used to prepare the Brief of *Amicus Curiae*.

/s/ Thomas S. Leatherbury
Thomas S. Leatherbury